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No. 80-419

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

STATE OF ARIZONA

Petitioner,

vs.

MARICOPA COUNTY MEDICAL SOCIETY, MARICOPA FOUNDATION FOR MEDICAL CARE, AND PIMA FOUNDATION FOR MEDICAL CARE,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF HOSPITAL BUILDING COMPANY AS AMICUS CURIAE IN SUPPORT OF PETITIONER, THE STATE OF ARIZONA

CHARLES GORDON BROWN
407 Colony Woods Drive
Chapel Hill, North Carolina 27514
(919) 942-4737

JOHN R. JORDAN, JR.
Post Office Box 709
Raleigh, North Carolina 27602
(919) 828-2501

JOHN K. TRAIN, III
LEAH J. SEARS-COLLINS
Alston, Miller & Gaines
1200 C&S National Bank Building
35 Broad Street
Atlanta, Georgia 30335
(404) 586-1500

Attorneys for Amicus Curiae
HOSPITAL BUILDING COMPANY

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On consent of all of the parties, Hospital Building Company submits this brief amicus curiae in support of the petitioner, the State of Arizona.

INTEREST OF THE AMICUS CURIAE

Hospital Building Company ("HBC") is plaintiff-appellee in an antitrust suit in the United States District Court for the Eastern District of North Carolina entitled *Hospital Building Co. v. Trustees of the Rex*

Hospital ("*HBC v. Rex*"), Civil Action No. 4048.[1] HBC is a subsidiary of a proprietary hospital building and management company. Thus, HBC, and its parent company, are vitally concerned that the market for health care services is free and open and that competition in the health care industry is not subjected to artificial and anticompetitive restraints imposed by private parties acting in their own interests and without express congressional direction and approval.

During the trial of *HBC v. Rex* one question presented to the District Court was whether a conspiracy: (i) to exclude HBC from competing for the business of providing hospital services in the Raleigh, North Carolina market; (ii) to prevent HBC from expanding its hospital to share in the growth of the market for hospital services; and (iii) to allocate customers and types of hospital services among the two other existing hospitals in the Raleigh market, if proven, should be considered a *per se* violation of Section 1 of the Sherman Act, 15 U.S.C. § 1,[2] or considered under the Rule of Reason. The defendants contended that the District Court should permit them to introduce evidence as to

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[1] The case was previously before this Court to determine whether the federal courts had jurisdiction under the Sherman Act over the claims set forth in HBC's complaint, specifically, whether sufficient effects on interstate commerce were alleged. This Court held that the Sherman Act covered the offenses alleged. *Hospital Building Co. v. Trustees of Rex Hospital*, 425 U.S. 738 (1976).

[2] HBC also brought its action to recover treble the amount of damages incurred by HBC as a result of violations by one defendant of Section 2 of the Sherman Act, 15 U.S.C. §2, and the jury found in favor of HBC on this claim as well as on the Section 1 claim.

the unique aspects of the health care industry in general, for the purpose of excusing the anticompetitive impact of their conspiracy with others which resulted in the blocking of HBC's efforts to relocate and expand its hospital facilities in Raleigh, and the allocation among the defendants and their co-conspirators of the provision of hospital services in the Raleigh, North Carolina area. The District Court rejected the defendants' contention, however, and ruled that an exclusionary horizontal conspiracy among competing health care providers must be treated under a *per se* antitrust standard. The District Court therefore: (i) excluded opinion evidence concerning the nature of the "health care" industry in general, and (ii) charged the jury on a *per se* standard as to HBC's Section 1 claims.

State of Arizona v. Maricopa County Medical Society, No. 80-419, raises the general issue common to both this case and *HBC v. Rex*[3] of whether restraints, traditionally given *per se* treatment because of their inherently severe and pernicious impact upon competition, should be analyzed under the *per se* rule or the Rule of Reason when activity in the health care industry is being challenged. Thus, the arguments to be presented before this Court and the decision of this Court could be material and germain to an important issue which will undoubtedly arise in the appeal of

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[3] There is a material difference between HBC's suit and the instant case. In this case the Court is faced with a relatively direct link to the fee-fixing practices of the medical care profession. The restraint imposed upon hospital building construction and related services in *HBC v. Rex*, on the other hand, involved only incidentally the practice of medicine.

HBC v. Rex. HBC fully supports the contention of the petitioner here that restraints consistently treated as *per se* violations have the same character in the health care industry and that, therefore, the *per se* standard should be applied in the health care industry just as in any other industry, absent congressional action to limit or abolish the application of that standard. HBC also, however, has a separate fundamental interest to insure that, whatever the decision in this case on the agreement among the competing members of the medical profession to establish fee schedules and thus regulate competition, this Court does not establish a precedent which would eliminate competition in the health care industry by allowing the absolute exclusion of competitors from markets.

SUMMARY OF ARGUMENT

The particular type of restraint involved in the instant case is price-fixing. This Court has never condoned price-fixing because the prices fixed were reasonable, because the price-fixing agreement was entered into by a professional or because the price-fixing occurred in a particular industry with supposedly unique characteristics. This Court, therefore, should treat the price-fixing agreement in the present case just as it has traditionally treated price-fixing agreements, using the *per se* standard of antitrust scrutiny.

Congress, the body to which all requests for antitrust exemptions should properly be addressed, has never exempted all activities in the health care

industry from the Sherman Act.[4] In some limited instances, specific exemptions have been granted, but no such exemption exists for the price-fixing agreement in the instant case. For this reason, the Ninth Circuit's argument that the characteristics of the marketplace for health care services could possibly make monopolistic and other anticompetitive arrangements preferable to competition as a means of controlling prices is foreclosed.

Contrary to the Ninth Circuit's suggestion in the case at bar, there is no inherent contradiction between the *per se* rule and the Rule of Reason such that the *per se* rule cannot be appropriately applied in the instant case. Rather, the *per se* rule is a category of Rule of Reason analysis, reflecting that courts have concluded that anticompetitive impact exists in a certain case because experience has taught that a particular practice is inherently anticompetitive. When the Rule of Reason is understood in this way, it is clear that the proper focus of the Ninth Circuit in the instant case should have been on the particular type of restraint involved rather than on the suggested complex characteristics of the health care industry.

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[4] Indeed, *National Gerimedical Hospital and Gerontology Center v. Blue Cross of Kansas City*, 479 F.Supp. 1012 (W.D. Mo. 1979), *aff'd* 628 F.2d 1050 (8th Cir. 1980), *cert. granted*, 49 U.S.L.W. 3531 (January 26, 1981) (No. 80-802), presently pending before this Court, involves the question of whether congressional authorizations for particular activities in the health care industry constitute an implied repeal of the Sherman Act as to those activities and as to the persons who participate in them.

ARGUMENT

I. The Anticompetitive Impact of Respondents' Conduct and of the Restraints of Trade Involved May Properly be Presumed.

A. *IN RULING THAT THE REASONABLENESS OF AN AGREED UPON PRICE IS A DEFENSE TO A PRICE-FIXING CHARGE, THE NINTH CIRCUIT HAS DEPARTED FROM A CONSISTENT AND UNBROKEN LINE OF DECISIONS BY THIS COURT.*

This Court has long held that an agreement which interferes with the setting of price by free market forces is illegal on its face. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927); *United States v. Addyston Pipe & Steel Co.*, 175 U.S. 211 (1899). This fact was most recently reaffirmed in *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980). There, this Court, in a *per curiam* opinion, held that:

> A horizontal agreement to fix prices is the archetypal example of such a practice. It has long been settled that an agreement to fix prices is unlawful *per se*. It is no excuse that the prices fixed are themselves reasonable.

Id. at 647. Furthermore, this Court's opinion in *National Society of Professional Engineers v. United States*, 435 U.S. 679, 692-693 (1978), directed that Rule of Reason analysis *should not* be used when a

trade restriction results in the fixing of rates or prices by private agreement, notwithstanding allegations in that case that professional engineers have a unique place in society and that the professional engineer is responsible for public projects and other activities which arguably are vested with a peculiar public interest. This Court in *Professional Engineers* wrote:

> The Rule of Reason suggested by *Mitchel v. Reynolds* has been regarded as a standard for testing the enforceability of covenants in restraint of trade which are ancillary to a legitimate transaction, such as an employment contract or the sale of a going business. Judge (later Mr. Chief Justice) Taft so interpreted the Rule in his classic rejection of the argument that competitors may lawfully agree to sell their goods at the same price as long as the agreed-upon price is reasonable. *United States v. Addyston Pipe & Steel Co.* 85 F. 271, 282-283 (CA6 1898), *aff'd*, 175 U.S. 211, 44 L.Ed. 136, 20 S.Ct. 96. That case, and subsequent decisions by this Court, unequivocally foreclose an interpretation of the Rule as permitting an inquiry into the reasonableness of the prices set by private agreement. (footnote omitted).

Professional Engineers, supra at 689.

The foregoing cases make clear that an attempt to invoke the unique status of an industry to change a *per se* case into a Rule of Reason case fails where the restraint is price-fixing.

B. *THE SUPPOSEDLY UNIQUE CHARACTERISTICS OF THE HEALTH CARE INDUSTRY ARE IRRELEVANT WHERE THE RESTRAINT INVOLVED IS A PER SE VIOLATION.*

1. *There is No Special Standard for the Analysis of Anticompetitive Restraints Involving Professional Medical Services.*

Medical professionals who engage in price-fixing may not invoke their occupations as a shield against attack under the Sherman Act. The scope of an antitrust exception for professionals was sharply curtailed in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), where this Court struck down a minimum fee schedule for real estate title examinations imposed by a county bar association. Additionally, in *Professional Engineers, supra*, where the canon of ethics of the petitioner's professional society prohibited its members from submitting competitive bids for engineering services, this Court rejected another opportunity to create a professional services immunity doctrine. *Goldfarb* and *Professional Engineers* reaffirm what the Sherman Act directs: Where price-fixing is an issue, judicial focus, even when professionals are involved, should be on the particular anticompetitive practice at issue as opposed to the occupation of the offenders of the antitrust laws.

2. *To Rule That Anticompetitive Restraints Already Defined as Per Se Unlawful May be Acceptable in the Health Care Industry Would Exempt that Industry from Established Standards of Antitrust Enforcement.*

The Ninth Circuit somehow concludes that because of the special nature of the health care industry, anticompetitive arrangements could better promote trade. As a result, the Ninth Circuit determined that the health care industry is exempt from established antitrust analysis. It should be noted, however, that Congress, the body to which all requests for antitrust exemptions should properly be addressed, has made it clear that it values competition in the health care industry.[5] In addition, Congress, even though it has ex-

[5] In fact, in the 1979 amendments to the 1974 National Health Planning and Resources Development Act, 42 U.S.C. §300K *et seq.* (1976 ed.), where Congress provided only limited exemptions from the antitrust laws for health systems agencies and their officials or employees acting within the scope of the duties specifically outlined for them under the Act, Congress expressed its intent that competition should prevail in the health care industry. Presently mandated as a national health priority is:

> (17) The strengthening of competitive forces in the health services industry whenever competition and consumer choice constructively serve . . . to advance the purpose of quality assurance, cost effectiveness, and access.

National Health Planning and Resources Development Amendments of 1979, 42 U.S.C. §300K-2(a)(17) (1979 Supp. III). To the same effect is another congressional provision:

> (3) For the health services for which competition appropriately allocates supply consistent with health systems

empted other industries from the antitrust laws,[6] has never seen fit to insulate the health care industry in its entirety from competition.

In view of the foregoing, the Ninth Circuit's opinion that the anticompetitive characteristics of the medical marketplace could make monopolistic arrangements preferable, sharply diverts from the will of Congress.

C. *THERE IS NO CONTRADICTION BETWEEN THE PER SE RULE AND THE RULE OF REASON SUCH THAT THE PER SE RULE CANNOT BE APPROPRIATELY APPLIED IN THE CASE AT BAR.*

The Ninth Circuit's opinion suggests that there is an intrinsic contradiction between the *per se* rule and the Rule of Reason. In point of fact, however, no such contradiction exists. Every successful Sherman Act case must include a showing of an "unreasonable" restraint on competition. The *per se* rule is a category of analysis under the Rule of Reason which has as its

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plans and State health plans, health systems agencies and State health planning and development agencies should in the performance of their functions under this subchapter give priority . . . to actions which would strengthen the effect of competition on the supply of such services.

42 U.S.C. §300K-2(b)(3) (1979 Supp. III).

[6] Congress has exempted certain industries from the reach of the Sherman Act. *See, e.g.*, 7 U.S.C., §§291-292 (1976 ed.) (Capper-Volstead act, agricultural cooperatives); 15 U.S.C. §§1011-1013 (1976 ed.) (McCarran-Ferguson Act, insurance); 15 U.S.C. §1801 (1976 ed.) (Newspaper Preservation Act, newspaper joint operating agreements).

purpose determining whether the restraint is of a type which historically has been determined to be so hostile to competition that no further examination of its effects need be made. *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1,5 (1958).

Ultimately, then,

> . . . [T]he *per se* doctrine is precisely a special case of rule of reason analysis. Where experience teaches that a particular practice is of a kind which blatantly restricts competition, we then know without further analysis how the balance will come out; we are spared the need for elaboration. Price fixing, for example, is a naked restraint of competition. Even if in some particular manifestation its negative impacts may be muted, it is hard to conceive that there would be any consequent enhancement of competition in some other respect or, if there were, that the enhancement would be so great as to render the restraint insignificant.

L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST § 72 (1977).

Combined with the Ninth Circuit's misconception of *per se* analysis is a misunderstanding of the purpose of the Rule of Reason. As this Court stated in *Professional Engineers, supra* at 688:

> Contrary to its name, the Rule [of Reason] does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason. Instead, it focuses directly on

the challenged restraint's impact on competitive conditions.

Thus, the Ninth Circuit's shift of focus from the nature of the restraint to the industry involved misapplies both the *per se* doctrine and the Rule of Reason. Whenever a federal court is reviewing a challenged restraint of trade pursuant to the Rule of Reason, the court need not study the intricacies of a given trade practice, the characteristics of the industry in which the practice takes place, the public interest, or the interest of the members of the industry, any further than is necessary to make a fully informed determination of the restraint's impact on competitive conditions in the relevant marketplace. *Professional Engineers*, *supra* at 692. When, however, a federal court is reviewing a challenged restraint of competition pursuant to the *per se* rule, the restraint's impact on competitive conditions in the marketplace is presumed. No further inquiry into the restraint's purpose or economic impact is necessary to show a violation of the Sherman Act. *Id.*

II. Conclusion

For the foregoing reasons, the amicus, Hospital Building Company, respectfully requests that this Court reverse the Ninth Circuit's opinion in the case at bar and hold that health care professionals and the health care industry possess no special characteristics which change the long-recognized rule that a horizontal collaboration among competing health care providers to fix prices should be treated by courts under a *per se* antitrust standard.

Respectfully submitted this 23rd day of May, 1981.

CHARLES GORDON BROWN
407 Colony Woods Drive
Chapel Hill, North Carolina 27514

JOHN R. JORDON, JR.
Post Office Box 709
Raleigh, North Carolina 27602

JOHN K. TRAIN, III
LEAH J. SEARS-COLLINS
Alston, Miller & Gaines
1200 C&S National Bank Building
35 Broad Street, N.W.
Atlanta, Georgia 30335

Attorneys for Amicus Curiae
HOSPITAL BUILDING COMPANY